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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554

JUN 1 1993  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Sections of )  
the Cable Television Act )

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## SUMMARY

As Congress and the Federal Communications Commission have emphasized, the consumer is the intended beneficiary of the Cable Television Consumer Protection and Competition Act of 1992. The rate regulations adopted by the Commission, however, could inadvertently disserve viewers by effectively eliminating cable operators' flexibility to offer commercial-free, premium services like The Disney Channel on a program service tier.

Although initially The Disney Channel was available only as a per-channel service, it is now available in more than 300 markets on a program tier. Including The Disney Channel on a tier allows children and families to receive Disney's highly acclaimed programming at a substantially lower price than they would pay on a per channel basis. Research reveals that in markets in which Disney is offered on a program tier, The Disney Channel has quickly become one of the most watched cable services.

In giving cable operators the flexibility to include The Disney Channel on a program tier, Disney has not compromised its high-quality (and therefore high-cost) programming. And The Disney Channel remains commercial-free. As a result, the license fee Disney must charge cable operators remains higher than the typical license fee charged by advertiser-supported program services.

In adopting the benchmark system, the Commission did not focus on the fact that in limited instances a commercial-free, premium service like The Disney Channel may be part of a regulated tier. Because the license fee for a commercial-free service will almost always be higher than the per channel benchmark, cable operators will have no incentive to carry such a service on a regulated program tier. Thus, cable operators who do not currently carry The

Disney Channel on a program tier are unlikely to add it to such a tier; some who currently carry it on a tier are considering removing it.

Such a result would disserve viewers, who either will have to pay more for their cable service overall (just when they thought their rates would be decreasing) or, alternatively, will be unable to afford The Disney Channel. The Commission can avoid this unintended result by making the limited clarifications and modifications requested in this Petition. Specifically, Disney asks the Commission to permit cable operators to pass through the cost of commercial-free, premium services to the extent the cost exceeds their systems' marginal per channel benchmark, at the time that such a service is added to a program tier or, if the service is already carried on a tier, as of October 1, 1993 (the effective date of regulation) or at the earliest date thereafter consistent with the rate freeze. Moreover, program cost must be defined to include both the license fee and a reasonable profit. Without a profit component, cable operators will have no economic justification for carrying a premium service on a regulated tier, notwithstanding the benefits to their subscribers.

The requested clarifications and modifications are amply supported by the Act and legislative history. The proposed changes will, moreover, benefit consumers by allowing them to receive high-quality, commercial-free programming such as The Disney Channel at a dramatically lower price as part of a program tier. It is the viewers, after all, who consistently voice their strong approval of Disney programming. And it is the intent of the legislation to facilitate the viewers' ability to receive cable programming at a lower price. For these reasons, the Commission should make the clarifications and modifications requested in this Petition.

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In the Matter of )  
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Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )  
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Rate Regulation )  
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MM Docket No. 92-266

To: The Commission

**PETITION FOR CLARIFICATION AND RECONSIDERATION  
OF THE DISNEY CHANNEL**

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. 1.429(a), The Disney Channel ("Disney"), hereby petitions the Federal Communications Commission to clarify in part and, reconsider and amend in part, the Commission's Report and Order ("Order") in the above-captioned proceeding.

**INTRODUCTION**

By this Petition, Disney requests the Commission to clarify and, as necessary, make changes to the rate regulations adopted pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("Act"), as follows:

1. Allow the programming cost of a commercial-free, premium service to be passed through, to the extent such cost exceeds the cable operator's marginal per channel benchmark, at the time such program service is added to a regulated tier;

2. Allow the programming cost of a commercial-free, premium service already carried on a regulated tier to be passed through, to the extent such cost exceeds the cable operator's marginal per channel benchmark, as of October 1, 1993, the effective date of regulation, or at the earliest possible date thereafter consistent with the rate freeze; and
3. Define programming cost to include both the license fee and a reasonable profit.

As explained below, these requested clarifications and modifications to the Commission's rules are amply supported by the Act and the legislative history. Moreover, and significantly, however, these clarifications and modifications will enable consumers to receive high-quality, commercial-free programming such as The Disney Channel for a price dramatically lower than when the service is offered on a per channel basis. If, as has been stated throughout the legislative and regulatory process, consumers are to be the ultimate beneficiaries of the Act, then the Commission must grant the requests made in this Petition.

### **FACTUAL BACKGROUND**

The Disney Channel is a 24-hour, satellite-delivered, commercial-free, premium programming service offered to consumers through cable systems and other multichannel video programming distributors. Launched on April 18, 1983,<sup>1</sup> Disney was available initially to cable system operators. Shortly thereafter, Disney began aggressively marketing its service to other distributors (*i.e.*, SMATV and MMDS), and also offered its service in the TVRO market, both direct-to-consumers through its own home satellite services department and through third party distributors such as the National Rural Telecommunications Cooperative.

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<sup>1</sup> Of the five major premium services, Disney was the last to launch -- HBO launched in 1972, Cinemax in 1980, Showtime in 1978, and The Movie Channel in 1979.

Disney also recently entered into an agreement with DirecTv for distribution via direct broadcast satellite.

The Disney Channel is carried by cable systems representing more than 95 % of the cable subscribers in the United States. It currently has more than 7 million subscribers. Cable operators are given the flexibility to offer Disney in a manner that best meets consumers' needs in their particular markets. In different markets, therefore, Disney is offered in different ways: on a per channel basis in some markets; as part of a package of premium services at a discounted retail price in others; and as part of a programming service tier in other markets.<sup>2</sup>

Only recently have cable systems had the flexibility to include The Disney Channel on a programming service tier. For many years, Disney was available to consumers only on

subscribers) a dramatically lower license fee. From this challenge, Disney's strategy of allowing cable operators the flexibility to include its service on a program tier emerged. In return for volume and penetration rate guarantees from cable operators, The Disney Channel was able to reduce substantially license fees on a per subscriber basis when offered as part of a tier.

The Disney Channel was first included on a program tier in 1990. Since then, cable systems in Las Vegas, NV, Louisville, KY, Pimo, AZ, Ft. Myers, FL and Wildwood, NJ, to name a few, have opted to offer the service on a program tier. The inclusion of The Disney Channel as part of an upper tier of a programming service tier has increasingly been met with broad enthusiasm and acceptance by consumers, cable operators and local municipalities across the country.<sup>4</sup> By making itself available in certain markets on a program tier, Disney did not convert itself from its current status as a commercial-free, premium service to an advertiser-supported, basic service, but simply customized its marketing options to meet the needs of local cable operators and their subscribers.

In particular, research and experience have proven that adding Disney to an upper tier of program services serves the public interest by giving more consumers access to popular, commercial-free, non-R-rated programming (much of it geared toward educating and entertaining children) at a lower price. For example:

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<sup>4</sup> Initially, some cable operators were concerned about this new positioning of The Disney Channel because they were not sure that the loss of premium revenue from Disney Channel subscribers would be made up by the addition of new, upper tier (expanded basic) subscribers. Now, over 300 cable systems nationwide carry The Disney Channel on a program service tier and hundreds of thousands of cable customers receive The Disney Channel this way. Subscriber growth and subscriber satisfaction have met or exceeded cable system goals following this repositioning of the service.

- When Disney is purchased on a per channel basis, subscribers' total cable bills average \$29.00 per month. In contrast, when Disney is purchased as part of a tier, subscribers' total cable bills average \$19.50 per month, a savings of almost \$10.00 per month.<sup>5</sup>
- By adding Disney to a tier, incremental converter box fees are, in most cases, eliminated, making it more affordable to more households.<sup>6</sup> At present, 27% of basic subscribers in cable systems offering The Disney Channel on a per channel basis are required to pay a converter box fee or deposit to receive the service. (By contrast, only half of these same basic subscribers need a converter box for HBO.)<sup>7</sup> More than half of non-subscribers surveyed cite cost and/or the converter box fees as the reason they have not become Disney Channel subscribers.<sup>8</sup> Even though the new regulations cap converter box costs, it is still an extra cost that many Disney subscribers must incur to subscribe on a per channel basis.
- The number of cable subscribers who say their cable service is a good value for the money *doubles* when Disney is added to a program service tier.<sup>9</sup>
- Cable systems conducting research following their repositioning of Disney as part of a program tier found that The Disney Channel was consistently one of the three most viewed services (along with ESPN and CNN).<sup>10</sup>
- Customers have expressed their positive opinions of cable systems that have made Disney available with basic service by writing thank-you notes to their cable systems and by

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5 Subscriber Survey, Disney Channel Quarterly; The Disney Channel Tier Database, 1992-93 YTD.

6 This is true for subscribers with cable-ready television sets in markets where the cable operator uses traps rather than set-top scrambling decoders to secure the program services carrier on the tier.

7 The Disney Channel Technology Database, 1991.

8 Disney Channel Quarterly.

participating in special events co-sponsored by Disney and the local cable operator.

- In Las Vegas, NV, where Disney was repositioned to an upper tier of service on September 1, 1992, the city manager wrote a letter to the cable system thanking it for making The Disney Channel available on a program tier. The city awarded both the cable system and Disney a key to the city, and the city council proclaimed October 21, 1992 "Disney Channel Day."
- When the franchise authority in Harriman, TN approved a fifteen-year franchise renewal for the local cable operator, it did so after receiving reassurance that The Disney Channel would continue to be available on an upper tier of service.<sup>11</sup>

Disney remains a commercial-free, premium service even when offered on a program service tier. Consequently, all of its revenue comes from license fees paid by cable operators and because there is no ad avail revenue for cable operators to offset the programming cost, cable operators must rely exclusively on monthly subscriber revenue to pay Disney's license fees. Because there is only one revenue stream, Disney must charge cable operators carrying the service on a program tier license fees that are higher than those charged by advertiser-supported services.<sup>12</sup>

As a result, The Disney Channel's license fee will, in almost all cases, exceed the Commission's per channel benchmark and the cable system's marginal per channel benchmark. As described more fully below, this, in turn, puts enormous pressure on the cable operator to offer Disney only on a per-channel, unregulated basis -- notwithstanding the benefit to subscribers if it is available on a program tier. Thus, cable operators who planned to add The Disney Channel to a program tier have put those plans on hold, and

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11 City Council meeting, Harriman, TN, January 5, 1993.

12 Advertiser-supported program services receive up to two-thirds of their revenue from advertising and only one-third from license fees. Paul Kagan, Cable TV Programming Newsletter, August 14, 1992, at 2.

performers who currently carry Disney on a tie have indicated that they may be forced to

Further, the Commission states that, "the starting date for measuring changes in external costs for which the basic service per channel rate may be adjusted will be the date on which the basic service tier becomes subject to regulation or 180 days after the effective date of our regulations adopted in this *Report and Order*, whichever occurs first."<sup>15</sup> And, "[f]or a cable programming services tier, the initial date of regulation shall be the first date on which a complaint on the appropriate form is filed with the Commission concerning rates charged for the cable programming services tier."<sup>16</sup>

In addition, the Commission states that "regulated cable operators may adjust the capped base per channel rate for the basic service tier annually by the GNP-PI."<sup>17</sup> The

cable operators) are able to understand how much and when a cable operator can pass through the programming cost increase due to the addition of a *new* program service.<sup>21</sup>

The Commission can easily clarify this ambiguity by specifically allowing cable operators to pass through the programming cost at the time the program service is newly added to a regulated program service tier. For commercial-free, premium services, the cable operator should be permitted to pass through the cost to the extent it exceeds the marginal per channel benchmark, and cost must be defined to include a reasonable profit. For the reasons stated below, this clarification is consistent with both Congressional intent and the Commission's Order. Moreover -- and significantly -- this clarification will give the greatest benefit to consumers. Indeed, failure to provide this clarification will prevent high-quality, commercial-free program services such as The Disney Channel from being offered for a lower price as part of a regulated tier of programming services.

**A. The Requested Clarification Is Consistent With Congressional Intent**

There is extensive discussion in the Order as to what Congress intended in passing the Act. The Commission states, "[t]he priority established in the Act is clearly to protect the interest of subscribers. An important focus for both basic tier and cable programming service rates, consistent with providing system operators a fair return, is the establishment of rate

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(Footnote 20 Continued)

tier. That argument, however, does not affect the request for clarification set forth in this section pertaining to pass-throughs when premium services are added to a programming service tier.

21 Disney understands that the FCC has yet to release the forms setting forth the precise methodology for calculating external program costs and allocating them to the appropriate tiers. (Order at ¶ 253 n.604). If such forms resolve the issue to allow for the programming cost to be passed through, to the extent it exceeds a cable system's marginal per channel benchmark, at the time the service is added to a tier, as requested by Disney, then no further action on this portion of our clarification request is necessary. If the Commission's form clarifies this issue in a manner inconsistent with this request, then we ask the Commission to treat this clarification request as a request for reconsideration.

levels equivalent to rates that would be charged in the presence of effective competition."<sup>22</sup> It continues by stating, "the legislative history makes it clear that the concern of the Act is with the exercise of market power by cable system operators, and is not with the returns earned by those entities supplying cable programming, a market in which there is abundant and increasing competition."<sup>23</sup> The Commission concludes:

The Senate Committee clearly indicated that it had "no desire to regulate programming." The House Committee recognized that programming costs were likely to change during the rate cycle and suggested that the Commission might develop "pass throughs" or other appropriate regulatory mechanisms to avoid unnecessary constraints on the cable programming market while protecting the interests of subscribers.<sup>24</sup>

From these statements, it seems eminently clear that Congress expected that programming cost pass-throughs would be permitted at any time, including at the time a program service is newly added to a regulated tier. Moreover, it would disserve the legislative intent to benefit subscribers if the Commission's regulatory scheme effectively prevented cable operators from offering a service like The Disney Channel in a manner that makes it available to more viewers at a significantly lower price.

Disney is not asking the Commission to take action based on the content of its program service. It is worth noting, however, that cable operators will include on program tiers only program services with family-oriented content. Thus, none of the other major premium services will be carried on program tiers. As a practical matter, therefore, granting this request will have limited applicability and hence will not impede the overall goal of fostering cable rate reductions.

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<sup>22</sup> Order at ¶ 8.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## **B. The Requested Clarification Benefits Cable Viewers**

Disney tends to be available on upper tiers of program services in those markets in which competition among multichannel video programming distributors exists.<sup>25</sup> One of the primary goals of the Act is to increase competition among multichannel distributors.<sup>26</sup> It would be illogical if the new rate regulations deterred consumers from reaping some of the potential benefits resulting from a competitive environment -- including greater access to high-quality programming for a lower price, particularly commercial-free programming that educates and entertains children. Given that The Disney Channel has been made available on program service tiers in *competitive* markets, public policy should continue to support the availability of Disney on program tiers in *non-competitive*, regulated markets.

Disney's marketing flexibility, which allows the inclusion of its commercial-free, premium service as part of a regulated tier in any market, should not be viewed as antithetical to the Commission's objectives of encouraging the offering of program services on a per channel basis. As more and more cable systems utilize addressable technology and offer greater numbers of quality channels on an *a la carte* or per channel basis, The Disney Channel will compete aggressively in that marketplace. The point is, at present, and into the foreseeable future, the majority of cable systems are *not* fully addressable, and cable programming services are being sold on tiers and in packages. For Disney to function effectively in this environment, it too must have this marketing option available.

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<sup>25</sup> See Attachment A. Competition may not be "effective" as defined in the Act and the Commission's regulations.

<sup>26</sup> 47 U.S.C.A. § 521 note (West Supp. 1993).

**C. The Term "Programming Cost" Needs To Be Defined To Include The License Fee And A Reasonable Profit**

Throughout the Order, the Commission uses the term "programming cost." Yet, this term is not defined. It needs to be defined -- and should be defined to include both the license fee paid to the program supplier and a reasonable profit for the cable operator. Without a profit component, cable operators will have no economic justification for carrying a premium service like The Disney Channel on a regulated tier, even if their subscribers would benefit.

The Act sets forth the factors the Commission was to consider when prescribing its rate regulations.<sup>27</sup> For basic service, Congress specifically includes "a reasonable profit."<sup>28</sup> While Congress did not explicitly instruct the Commission to include reasonable profit when regulating cable programming service tiers,<sup>29</sup> it gave the Commission the discretion to do so. Congress did not provide the Commission with a definitive list of factors to consider. The Act states, "the Commission shall consider, among other factors,"<sup>30</sup> thereby affording the Commission the discretion to determine what else should be considered. The Commission, in turn, properly recognized that in establishing "both basic tier and cable programming service rates," it should do so in a manner "*consistent with providing system operators a fair return . . . .*"<sup>31</sup> Moreover, when adopting the same benchmarks for basic service and cable

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27 47 U.S.C.A. § 543(b)(2)(C), 543(c)(2) (West Supp. 1993).

28 47 U.S.C.A. § 543(b)(2)(C)(vii) (West Supp. 1993).

29 47 U.S.C.A. § 543(c)(2) (West Supp. 1993)

30 *Id.*

31 Order at ¶ 8 (emphasis supplied).

programming services, the Commission accepted the same standards and factors to regulate both levels of service. It would be an illogical result if the Commission's regulations took into account reasonable profit for basic service regulation and excluded it from cable programming services regulation -- particularly because Congress clearly intended to give the Commission greater latitude in deciding how to regulate programming service tiers.

While there are many benefits other than profit to carriage of The Disney Channel on a tier -- customer satisfaction, subscriber growth, positive government relations -- cable operators need and expect some profit to justify the expense. Profit, after all, is fundamental to a commercial enterprise and cable systems are commercial enterprises. Without some ability to earn a reasonable profit, cable operators will never carry premium services like The Disney Channel on a program service tier. Simply stated, this result, while perhaps unintended, would disserve the public interest, given consumers' positive response to The Disney Channel on a tier.

Because the Commission has already identified 11.25% as a reasonable allocation for profit in the context of equipment,<sup>32</sup> this amount may be appropriate in the context of programming costs for commercial-free services as well.

**D. The Programming Cost Pass-Through Must Be Measured  
Against The Marginal Per Channel Benchmark**

In order to have any practical effect, the programming cost pass-through must be measured against the marginal per channel benchmark. Under the Commission's benchmark

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<sup>32</sup> Order at ¶ 295 n.715.

system, if a cable operator reduces the number of regulated channels, the per channel benchmark goes up, and conversely, if a cable operator adds a regulated channel, the per channel benchmark goes down. Therefore, when a cable operator is deciding whether to carry a premium service like Disney on a regulated tier -- as opposed to as a per channel, non-regulated offering -- the cable operator will calculate the return on investment against the cable system's *marginal* per channel benchmark, not the per channel benchmark.

Suppose, for example, that a cable system has more than 10,000 basic subscribers and a total of 35 channels, of which 5 are premium services sold on per channel basis, 2 are pay-per-view channels, 12 are must-carry broadcast stations, and 16 are cable networks. The per channel benchmark, according to the tables, would be \$0.725. If the cable system moves Disney to a regulated tier, and thus the number of premium per channel and pay-per-view services goes down to 6, while the number of total regulated channels goes up to 29 (with 17 cable networks), then the per channel benchmark decreases to \$0.705. As a practical matter, the cable operator can only charge its subscribers \$0.15 for the new service (because the cable operator can now charge \$20.45 for 29 channels, compared to \$20.30 for 28 channels).<sup>33</sup> It is this *marginal* per channel benchmark, therefore, that a cable operator will use in determining whether it is economically feasible to add a new program service.

Cable operators, like other business men and women, will assess their assets (in this case, a channel) to determine whether they can obtain a reasonable rate of return from the asset. To this end, cable operators will calculate the marginal per channel benchmark, and

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<sup>33</sup> A similar, although more dramatic, effect results for cable systems with greater channel capacity with more regulated channels.

will be unlikely to program that channel with a service that has a program cost exceeding that amount.<sup>34</sup>

**II. THE COMMISSION SHOULD ALLOW THE PROGRAMMING COST OF A COMMERCIAL-FREE, PREMIUM SERVICE ALREADY CARRIED ON A PROGRAM SERVICE TIER TO BE PASSED THROUGH, TO THE EXTENT THE COST EXCEEDS THE MARGINAL PER CHANNEL BENCHMARK, AS OF OCTOBER 1, 1993**

In its Order, the Commission concludes that only incremental program cost increases can be passed through.<sup>35</sup> We ask the Commission to reconsider this decision with respect to commercial-free, premium services that are already carried on regulated tiers. Specifically, we ask the Commission to allow the program costs of such services to be passed through, to the extent the cost exceeds the marginal per channel benchmark, as of October 1, 1993 -- the effective date of the Commission's rate regulations -- or at the earliest date thereafter consistent with the Commission's rate freeze.

Unless this change is made, cable systems currently carrying The Disney Channel on a regulated tier will no longer do so and, instead, will revert to carrying it as a per channel offering. At that time, all the benefits of carrying Disney on a regulated tier, as described above, will be lost. Many of the viewers now receiving The Disney Channel will not be able to afford or will choose not to pay the additional price to subscribe to Disney on a per channel basis. And, those who do will wonder why they are now paying more, and perhaps

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<sup>34</sup> Disney does not view the cost-of-service proceeding as a meaningful alternative to its dilemma because the decision by a cable operator to choose that method of cost justification will be made based on many factors, not just the programming cost of one service.

<sup>35</sup> Order at ¶ 174.

substantially more, for the same cable service -- just when they thought rates were supposed to decrease as a result of the Act.

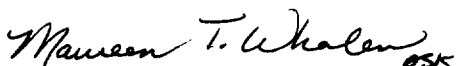
The retail price increase for The Disney Channel will be due not simply to the higher license fee that Disney must charge cable operators when the service is offered on a per channel basis (because fewer people subscribe). In many cases, there is the additional cost of the converter box that becomes necessary. Moreover, cable operators will add a profit margin

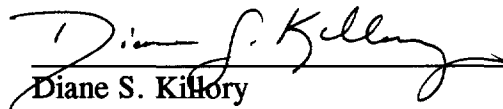
## CONCLUSION

For the reasons set forth above, the Commission should clarify and, as necessary, modify its rate regulation scheme so that cable operators continue to have the flexibility to put commercial-free, premium services like The Disney Channel on program service tiers. Specifically, the Commission should permit the program costs for such services, to the extent they exceed the cable operator's marginal per channel benchmark, to be passed through as of October 1, 1993 (or at the earliest date thereafter consistent with the rate freeze), or when such a service is newly added to a program service tier. These changes, which are fully consistent with legislative intent, will result in lower overall prices and better value for consumers.

Respectfully submitted,

  
Frederick Kuperberg

  
Maureen T. Whalen  
THE DISNEY CHANNEL  
3800 West Alameda Avenue  
Burbank, CA 91505  
(818) 569-7500

  
Diane S. Killory  
MORRISON & FOERSTER  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, D.C. 20006  
(202) 887-1500

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**THE DISNEY CHANNEL**  
**ATTACHMENT A**

